

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HOA T. BACH)	
Claimant)	
VS.)	
)	Docket No. 1,044,800
NATIONAL BEEF PACKING CO.)	
Respondent)	
AND)	
)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the October 31, 2011 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. At the request of the parties, oral argument scheduled in this matter on January 25, 2012 was waived and the matter placed on the Board's Summary Calendar. The parties agreed that if the Board reverses the ALJ and finds that claimant satisfied her burden of proving that she suffered personal injury by accident, which arose out of and in the course of her employment with respondent, the matter is to be remanded to the ALJ for decision on the remaining issues not addressed in the Award.

APPEARANCES

Gary E. Patterson, of Wichita, Kansas, represents the claimant. Kerry McQueen, of Liberal, Kansas, represents respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ denied claimant's request for compensation having found that claimant's accident and resulting injuries did not arise out of and in the course of her employment.

Claimant argues that her injuries resulted from an employment hazard and therefore are compensable. Claimant requests that the ALJ's Award be reversed and compensation granted.

Respondent argues that the ALJ's Award should be affirmed, arguing that claimant's injuries did not arise out of her employment. As noted above, if the Board finds in claimant's favor, the matter will be remanded to the ALJ for a determination of the remaining undecided issues.

The issues are:

1. Did claimant's accident arise out of and in the course of her employment with respondent?; If the Board finds in claimant's favor on this issue, the issues listed below will be remanded to the ALJ for the initial determination.

- a. What is the nature and extent of claimant's injuries?;
- b. Is claimant entitled to medical benefits including attendant care, future medical benefits and unauthorized medical benefits?;
- c. Is respondent entitled to a credit or reduction under K.S.A. 44-501(h) due to a pension claimant receives from her labor union and/or due to her receipt of social security retirement benefits?

FINDINGS OF FACT

Claimant is 69 years old and weighs 120 pounds. On February 20, 2009, at the end of her shift, claimant clocked out of work at about 10 p.m. She planned to ride home with her husband, son and daughter-in-law. Claimant's son told her that he would get the car and would meet her outside so she would not have to walk all the way to the parking lot. When he drove up, claimant, her husband and daughter-in-law walked toward the car. They were required to walk across a traffic way or street, and past the guard shack. It was a very windy night, and as claimant was walking toward the car, a gust of wind picked her up, and she fell into a steel railing or fence. She suffered injuries from the fall and has not yet returned to work.

Claimant testified that when she was working in the plant, she did not know the weather conditions outside. There was no one at the door to warn her of the wind gusting excessively that night.

Claimant's son, Hoi Duc Nguyen, left work about 10:25 p.m. and went to the parking lot to get the car. He said that his mother usually waited for him in the cafeteria. On the night of claimant's accident, Mr. Nguyen had some trouble walking out to the car because it was windy. He brought the car closer to the plant, but did not witness the claimant's fall.

George Hall, respondent's Human Resources Director, testified that the distance between the cafeteria and the security area was about 100 feet and the distance between

the security area and the railing or fence was 40 to 50 feet. Mr. Hall testified that it is not company policy that employees have to leave the plant when they clock out. In fact it is fairly common for employees to use the cafeteria to socialize after they clock out. He also stated that employees are not made aware of weather conditions while they are working or before they leave, unless there is a tornado warning.

Weather records introduced as an exhibit to the preliminary hearing show that between approximately 10 p.m. and midnight on February 20, 2009, the wind speed ranged from 11 to 40 miles per hour with gusts up to 46 miles per hour.

Claimant's son, Hoi Duc Nguyen, was deposed again on July 16, 2010, at which time he testified that when he and his family (mother, father, and sister-in-law) left for work on February 20, 2009, the weather was sunny and there was not a lot of wind. He testified that he parked approximately 80 feet from where employees are supposed to clock in. This is about a 3 minute walk.

Mr. Nguyen testified that claimant and his sister-in-law don't work overtime so they wait in the cafeteria at the end of their shift until he and his father are done and then they all ride home together. He testified that on February 20, 2009, after he finished his shift he left to get the car and bring it around. As he stepped outside he found it was dusty and windy. He testified that it wasn't a steady wind, but he had trouble walking to his car.

When he pulled up to where he was to pick up his family, he noticed a swarm of people and decided to park the car to go see what was going on. When he reached the crowd he found claimant, his mother, hurt. She was taken to the nurses' area. Claimant was then taken via ambulance to the hospital.

George Hall, respondent's Human Resources Director, was deposed again on July 16, 2010, at which time he testified that respondent does maintain the parking lot during inclement weather. This parking lot is monitored by security and everyone entering and exiting the facility must pass through the security checkpoint. Mr. Hall testified that depending on the weather conditions, a person could wait inside the building for as long as they needed before leaving for their car. Weather reports for the day of the accident show that the wind speed and gusts steadily rose from 8:30 pm to 11:30 pm. The report shows that the wind got up to 52.9 miles per hour with gusts up to 64 miles per hour. Even if claimant had waited another hour before leaving, the wind would have still been gusting at 46 per hour. He went on to state that the weather in Western Kansas is unpredictable and you don't know until you step out what you might be getting.

Mr. Hall testified he doesn't recall when he learned of claimant's accident. It is his understanding that claimant fell on the south side of the security gate in what he considers to be a part of the parking lot.

Claimant met with Dr. Pedro Murati for an IME on October 6, 2009. She had chief complaints of pain in both shoulders and occasional headaches. Dr. Murati noted that when claimant was blown down by the gust of wind her face hit the concrete she bruised her eye and her nose and injured both of her shoulders. Dr. Murati noted that claimant had preexisting significant injuries to her shoulder prior to the February 20, 2009 work-related injury.¹

Dr. Murati examined claimant and opined she was status post bilateral proximal humerus fracture, three part distal fracture, greater tuberosity severely displaced, open reduction internal fixation with four-hole proximal humerus periarticular locking plate with bone graft putty and had trigeminal neuropathy. He opined that his diagnoses were within all reasonable and medical probability a direct result from claimant's February 20, 2009 work-related injury. He assigned permanent restrictions based on an 8 hour day of no climbing ladders, no crawling, no heavy grasping more than 40 kg with the right or left, no above the chest work with the right or left, no lifting, carrying, pushing or pulling more than 10 pounds, rarely 10 pounds, occasionally 5 pounds and frequently 2 pounds, no work more than 12/11 inches from the body with the right or left. He also found claimant to have lost the ability to perform 5 out of 6 tasks for a 83 percent task loss.

Finally, Dr. Murati found that claimant's is essentially and realistically unemployable due to her age, physical condition and education level and assigned a combined impairment of 27 percent to the whole person (21 percent right upper extremity (13 percent whole person) for loss of range of motion of the right shoulder, 20 percent left upper extremity (12 percent whole person) for loss of range of motion of the left shoulder, an 5 percent whole person impairment for the trigeminal neuropathy).²

Karen Terrill interviewed claimant over the phone on December 10, 2009 for a vocational assessment and opined that because of claimant's lack of ability to speak English, her limited mathematical skills, and education and age, claimant is substantially and realistically unemployable and permanently and totally disabled.

Claimant met with Dr. Terrence Pratt for an IME on May 18, 2010. Claimant's chief complaints were pain in her shoulders to her arms and headaches. Dr. Pratt agreed that claimant's injuries were consistent with the trauma of coming into contact with a hard object. He doesn't recall ever seeing bilateral humeral fractures in an instance of someone being blown over. Dr. Pratt interviewed and examined the claimant and found that she was at maximum medical improvement for her posttraumatic headaches and better range of motion in her shoulders.

¹ Murarti Depo., Ex. 1 at 2 (Dr. Murati's Oct. 6, 2009).

² Murarti Depo., Ex. 1 at 3 (Dr. Murati's Oct. 6, 2009).

On November 12, 2010, Dr. Pratt added an addendum to his report in regard to a request to address restrictions and permanent impairment. He opined that the claimant had a 24 percent whole person permanent partial functional impairment (19 percent left upper extremity; 20 percent right upper extremity; 2 percent for headaches). He recommended claimant not perform overhead activities with her upper extremities, no lifting in excess of 10 pounds, and no pushing or pulling in excess of 20 pounds.³ He also found claimant to have lost the ability to perform 2 out of 6 tasks for a 33 percent task loss.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁷

³ Pratt Depo., Ex. 3 at 1 (Dr. Pratt's Nov. 12, 2010 addendum to IME).

⁴ K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2008 Supp. 44-501(a).

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

K.S.A. 44-508(f) states:

The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.⁸

K.S.A. 44-508(f) is a codification of the “going and coming” rule developed by the courts in construing the workers compensation act. The Kansas legislature has declared that there is no causal relationship between an accident and a workers employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.⁹

However, K.S.A. 44-508(f) contains exceptions to the “going and coming” rule. First, the rule does not apply if the worker is injured on the employer's premises.¹⁰ In *Thompson*, the Court held that the term “premises” is to be narrowly construed to an area controlled by the employer. Another exception is when the worker is injured while using the only route available to or from work which involves a special risk or hazard and the route is not used by the public, except when dealing with the employer.¹¹

However, there is an exception to the premises exception. When weather is introduced into the equation, it becomes claimant's burden to show that the work, in some way, increased the workers hazard to the elements. In *Faulkner*, the Kansas Supreme Court stated:

When the injury occurs from the elements, such as a tornado, or the like, the rule is that in order for it to be said the injury arose out of the employment, and thus compensable, it is essential there be a showing that the employment in some specific way can be said to have increased the workman's hazard to the element—that is, there must be a showing of some causal connection between the

⁸ K.S.A. 2008 Supp. 44-508(f).

⁹ *Thompson v. Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

¹⁰ *Id.* at Syl. ¶ 1.

¹¹ *Id.* at 40.

employment and the injury caused by the element, and that his situation was more hazardous because of his employment than it would have been otherwise.¹²

This matter originally came before the ALJ at a preliminary hearing. At that time, the ALJ, in her Order of May 11, 2009, found the matter compensable. A Board Member, after reviewing the ALJ's Order For Compensation, reversed, finding that there was nothing about the employment that caused claimant to be outside at the time she was, other than the fact her shift had ended and she was ready to leave. Claimant could have stayed inside in the cafeteria. Claimant acknowledged that she could have stayed inside the building. In fact, had it been hailing, she agreed that she probably would have stayed inside.

This is not a situation like *Faulkner*. In *Faulkner*, the claimant, a truck driver was following a fellow driver who was involved in a minor traffic accident. Both *Faulkner* and the other driver were instructed to remain at the accident scene, render aid if necessary and wait for the Yellow Transit Freight Lines terminal manager from Sherman, Texas to arrive. The weather in the area had been threatening that day. *Faulkner* specifically requested permission to leave the gas station where they were waiting, due to the adverse weather conditions. However, he was instructed to stay until the station manager arrived. A short time later, the station was demolished by a tornado and both *Faulkner* and his co-employee driver were injured. *Faulkner* later died of his injuries. The Court in *Faulkner* ruled that his employment subjected Faulkner to a greater hazard or risk than that to which he otherwise would have been exposed, and although the risk was common to all who were exposed, the test is whether the employment exposed the employee to the risk.

In this instance, claimant's employment did not place her in a situation where she was at greater risk than was the general public in that vicinity. In *Faulkner*, the claimant might have taken refuge from the storm had he been given the option. But, he was required by his employment to remain at the station. This claimant would have been equally exposed to the wind had she been walking in the parking lot of a local grocery store or at home plus claimant had the option to remain inside the plant if she wanted. Thus, claimant was subjected to the same risk or hazard as was the general public in that vicinity.

This claimant has failed to show that the injuries suffered on February 20, 2009, while she was leaving the respondent's plant, arose "out of" her employment with respondent. The denial of benefits in this matter is affirmed.

¹² *Faulkner v. Yellow Transit Freight Lines*, 187 Kan. 667, Syl. ¶ 2, 359 P.2d 833 (1961).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated October 31, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary E. Patterson, Attorney for Claimant
Kerry McQueen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge